CHE SOM YIP & ORS.

v.

MAHA PTE. LTD. & ORS.

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[SUIT NO. 2788 OF 1978]
30 JUNE 1989

CONTRACT: *Legal mortgage - Execution by person of unsound mind - Whether void or voidable - Other party's knowledge of unsoundness of mind - Whether knowledge may be imputed - Constructive knowledge - Undue influence.*

Present action is taken by the 1st and 2nd plaintiff on behalf of the 3rd plaintiff for a declaration that a deed of mortgage of a property dated 17 December 1974 allegedly executed by the 3rd plaintiff in favour of the 3rd defendant bank be declared null and void and of no legal effect. The said property was owned by the 2nd defendant and 3rd plaintiff as tenants in common in equal shares. The mortgage was executed as part security for banking facilities granted by the 3rd defendant bank to the 1st defendant company.

The main ground of this action is that the 3rd plaintiff was at the time of the execution of the mortgage deed, of unsound mind and incapable of managing himself and his affairs. Reliance was placed on the fact that an inquiry was held on 31 July 1978 into the mental condition of the 3rd plaintiff and an order was made that the 3rd plaintiff was of unsound mind and incapable of managing himself and his affair.

In the present case, the 1st defendant company was a trading company which dealt, among others, in rubber. The 2nd plaintiff and 2nd defendant (the 2 older brothers of the 3rd plaintiff) were directors and shareholders of the company. The majority shares were held by the 2nd plaintiff.

On or about 16 November 1973, upon request, the 3rd defendant bank granted a one million dollars banking facility to the 1st defendant company whereby the 1st and 2nd plaintiff and 2nd defendant signed a letter of guarantee to the 3rd defendant bank for a sum of one million. In addition the 2nd plaintiff forwarded to the 3rd defendant bank the title deeds of the said property to have the property equitably mortgaged to the 3rd defendant bank.

The 3rd defendant bank was subsequently advised by its solicitors, M/s. Osborne Jones & Co. to proceed on the basis of a 1st legal mortgage over the property for a sum of not exceeding $60,000. The 3rd defendant bank accepted the advice and a draft mortgage was drafted by its solicitors. All correspondence between the bank and its solicitors in respect of the legal mortgage were not copied to the 1st defendant company or the owners of the said property.

On 23 July 1974, the 3rd defendant bank forwarded a copy of the draft mortgage deed to the 1st defendant company for approval and was accepted by the 2nd plaintiff. At this point, the 1st defendant company would have been aware for the first time that the deed that was being prepared was for a legal mortgage of the said property.

On October 1974, the 3rd defendant bank's solicitors wrote to the 2nd defendant (as one of the owners of the said property) informing the owners of the property for execution of the mortgage deed at the solicitors's office. At this stage, there was a issue as to whether the 3rd defendant bank's solicitors also acted for the mortgagors (i.e. the 2nd defendant and the 3rd plaintiff). The solicitor gave evidence that he did not receive any express intimation that the borrowers and/or owners/mortgagors would wish him to act for them in that matter. He, in fact, assumed that the 1st defendant company would want him to act for them. During cross-examination, the solicitor stated that he acted for the 2nd defendant as director of the 1st defendant company but did not act for the 2nd defendant and 3rd plaintiff as owners of the property. And also, it did not occur to him at that time, to advice them to seek independant legal advice.

On the day of the execution, the solicitor was present and witnessed the execution. However, other than making sure from his staff as to the identity of the 3 persons there, who were about to sign the deed, he did not explain to any of them as regards the nature or contents of that document.

In respect of the mental condition of the 3rd plaintiff, the Court in fact accepted that the 3rd plaintiff had no capacity to understand the mortgage deed which he executed. It was in the Court's opinion that the very concept of a mortgage as a security for banking facilities to be granted by the 3rd defendant bank to the 1st defendant company in which his 2 other brothers had an interest is not a simple matter on which the 3rd plaintiff was able to understand. It is obvious that the 3rd plaintiff did not even know that he is a co-owner of the said property. Accordingly the Court held that the 3rd plaintiff had no capacity to enter into the mortgage deed on the day in question.

Nevertheless, the question to be considered here is whether the deed executed by the 3rd plaintiff who has no mental capacity is voidable against the 3rd defendant bank, whom counsel said was an innocent party.

Held:

[1] The development of law on the subject of void and voidable contracts was succintly stated by Lord Brightman in *Hart v. O'Connor* as follows:

> ... a contract with a person of unsound mind was void, because there could be no *consensus ad idem*. This was later qualified by a rule that a person could not plead his own unsoundness of mind in order to avoid a contract he had made. This in turn gave way to a further rule that such plea was permissible if it could be shown that the other contracting party knew of the insanity.

[2] Allegations by the 2nd plaintiff that the 3rd defendant bank knew or ought to have known that the 3rd plaintiff had a mental disorder and had no contractual capacity was no acceptable by the Court as the evidence given by the 2nd plaintiff was unsatisfactory. Further it is not possible to ascribe to any "look" as necessarily suggesting unsoundness of mind on the part of that person.

[3] Nevertheless, the point to consider is whether knowledge may be imputed to the 3rd defendant bank in view of the circumstances. Here it is accepted that the 2nd plaintiff never informed the 3rd defendant bank about the 3rd plaintiff's incapacity and also he never explained the draft mortgage deed to the 3rd plaintiff. However, the 3rd defendant bank, by dealing with the owners of the said property through the 2nd plaintiff rather

than directly, the 3rd defendant bank has made the 2nd plaintiff and the 3rd defendant bank must be imputed to have the knowledge which the 2nd plaintiff had of the mental incapacity of the 3rd plaintiff.

[4] Even assuming that the Court was wrong to impute knowledge to the 3rd defendant bank, constructive knowledge on the part of the 3rd defendant bank could still be inferred if one examines the circumstances surrounding the execution of the mortgage deed by the 3rd plaintiff, including the way in which the 3rd defendant bank dealt with the owners/mortgagors of the said property.

[5] The mortgage deed could also be set aside on grounds of undue influence on the part of the 2nd plaintiff as agent of the 3rd defendant bank. In the present case, while the relationship of the 2nd plaintiff and the 3rd plaintiff as brothers does not *per se* give rise to a presumption of undue influence, but on the evidence there can be no doubt that the 2nd plaintiff did in fact exercise undue influence over the 3rd plaintiff in securing the execution by the 3rd plaintiff of the mortgage deed. The 3rd defendant bank must have realised that some influence would have been brought to bear by the 2nd plaintiff over the 3rd plaintiff as the business of the 1st defendant company had nothing to do with the 3rd plaintiff and why should the 3rd plaintiff put his property at risk. Accordingly the mortgage deed should also be set aside on this ground.

[Declaration granted.]

Cases referred to:
Birkin v. Wing [1890] 63 LT 80
Hart v. O'Connor [1985] 1 AC 1000
Campbell v. Hooper [1855] 3 Sm & G
Imperial Loan Co. v. Stone [1892] 1 QB 599
National Westminster Bank v. Morgan [1985] AC 686
Turnbull & Co. v. Duval [1902] AC 429
Chaplin & Co v. Brammall [1908] 1 KB 233
Avon Finance Co. Ltd. v. Bridger [1985] 2 All ER 281
Kingsnorth Trust Ltd. v. Bell [1986] 1 All ER 423
Coldunell Ltd. v. Gallon [1986] 1All ER 429
Bank of Baroda v. Shah & Anor. [1988] 3 All ER 24
Neill v. Morley 32 ER 687
Molton v. Camroux 154 ER 1107

Other sources referred to:
Halsbury Laws of England at Vol. 30 (4th Edn.,)
Treital on Law of Contract (7th Edn.,) p. 314-5

For the plaintiffs - V. Ramakrishnan
For the 2nd defendant - Ng Kian Fong
For the 3rd defendant - Balachandran (Tan with him).

JUDGMENT

Chao Hick Tin JC:

The 1st and 2nd plaintiffs are the committee of the estate of the 3rd plaintiff, having been appointed by orders of Court under the Mental Disorders and Treatment Act. The present action is taken by the 1st and 2nd plaintiffs for and on behalf of the 3rd plaintiff for a declaration that a deed of mortgage (the mortgage deed) of the property at 344 Onan Road

(the said property) dated 17 December 1974 allegedly executed by the 3rd plaintiff in favour of the 3rd defendant be declared null and void and of no legal effect. They also ask for a declaration that all consequential entries made at the Registry of Titles and Deeds be declared null and void.

The mortgage deed was executed between Maha Pte. Ltd. (the 1st defendant) of the first part, Abdul Hamid Bin Bilal (the 2nd defendant) and the Alias Bin Bilal (3rd plaintiff) of the second part and Habib Bank Ltd. (the 3rd defendant) of the third part. The 3rd defendant was and is a bank incorporated in Pakistan and was at the relevant time having a branch and carrying on banking business in Singapore ("the bank"). The said mortgage was executed as part security for banking facilities granted by the 3rd defendant to the 1st defendant.

The 2nd defendant and the 3rd plaintiff are the tenants in common in equal shares of the said property.

The main ground upon which this action is brought is that the 3rd plaintiff was, at the time of the execution of the mortgage deed, of unsound mind and incapable of managing himself and his affairs. Reliance was placed on the fact that pursuant to originating Summons No. 237 of 1978 an inquiry was held on 31 July 1978 into the mental condition of the 3rd plaintiff and an order was made on that day that the 3rd plaintiff was of unsound mind and incapable of managing himself and his affairs. However, in view of the fact that order was obtained on an uncontested basis I do not think it is necessarily conclusive for the present action. The plaintiffs have not so asserted and a fairly substantial part of the time of this trial was spent in hearing evidence on the mental condition of the 3rd plaintiff. Before going into that aspect of the evidence it may be useful for me to set out some pertinent background facts.

Background

The 3rd plaintiff was born in the year 1935. He is 3 to 4 years younger than the 2nd plaintiff. Their mother passed away when the 3rd plaintiff was four years old and he was taken care of by his maternal aunties and his two elder sisters. He started to walk and to talk late. He was sent to attend a primary school when he was eight. However, he only attended school for up to about a year. He could not take care of himself at school, particularly his toiletting needs. He was asked to leave school. The 2nd plaintiff tried to teach the 3rd plaintiff at home. According to the 2nd plaintiff, the 3rd plaintiff was not able to execute simple assignments. According to an elder sister Zulaika Bte Bilal (PW4) the 3rd plaintiff would help in the house when asked to. But he could not do things properly. She said "even for the usual things to be done, he would not understand. I had to repeat many times. Whenever he talks, sometimes it makes sense, sometimes not." Even now PW4 has to supervise the 3rd plaintiff when he takes a bath.

Maha Pte. Ltd. (the company), the 1st defendant, was incorporated in Singapore on 12 September 1973. The company is now no longer in existence having been struck off the Register of Companies in December 1987. It was a trading company which dealt, among others, in rubber. The 2nd plaintiff and the 2nd defendant (the two elder brothers of the 3rd plaintiff) were directors of the company. The shareholders of the company were Ismail Bin Bilal (the 2nd plaintiff) holding 200,003 shares, Abdul Hamid Bin Bilal (the 2nd defendant) holding 50,002 shares and the 1st plaintiff (the wife of the 2nd plaintiff) holding 50,000 shares. A fourth person, one Kam Cheong Lin, held 1 share. Though in name the majority shares were held

by the 2nd plaintiff, I accept his evidence that the company essentially belonged to one Peter Wahid Andu, who was a top official with the Sabah Civil Service. It was not convenient to have it on record that he owned those shares. Thus, the shares which were in the 2nd plaintiff's name were in fact held in trust for Peter Wahid Andu.

Sometime on or about 16 November 1973, the company applied to the 3rd defendant for banking facilities - $400,000 for overdraft and trust receipts and $600,000 for letters of credit. The application was made by the directors of the company, i.e., the 1st plaintiff, the 2nd plaintiff and 2nd defendant who together also signed a letter of guarantee to the bank for a total sum of $1,000,000. The 2nd plaintiff and the bank must have discussed the need for more tangible security, because on 16 January 1974, the 2nd plaintiff, writing in his capacity as the managing director of the company (which began with the words "We spoke") forwarded to the bank the title deeds of the said property to enable the bank to complete the formalities to have the said property equitably mortgaged to the bank. The 2nd plaintiff wrote:

> This property is owned by the Bilal family in the name of my two brothers, namely, A Hamid Bin Bilal and Alias Bin Bilal. I would appreciate if you could prepare the necessary forms for completion by the above two gentlemen.

Following that the bank wrote to its solicitors, M/s. Osborne Jones & Co., requesting the latter to prepare the documentation for creating an equitable mortgage to the bank. I should mention here that the company also offered No. 339 Onan Road as security to the bank. For reasons relating to the title of that property which do not concern us here, house No. 339 Onan road was not accepted as security. The solicitors subsequently advised the bank not to proceed on the basis of an equitable mortgage but that a first legal mortgage over the said property should be created for a sum not exceeding $60,000. The bank accepted this advice and asked the solicitors to draw up the necessary documents creating a legal mortgage for up to $60,000, for a period of 5 years. On 18 July 1974 the solicitors forwarded to the bank a draft mortgage for its approval. At this point, I ought to mention that all these correspondence between the bank and its solicitors were not copied to the company or the owners of the said property.

In the meantime on 7 March 1974, Peter Wahid Andu attended at the bank and placed a sum of $250,000 on fixed deposit which was also to be a security for the banking facilities granted by the bank to the company. In addition Peter Wahid Andu also signed a letter of guarantee in favour of the bank for an amount of up to $500,000 for the facilities granted by the bank to the company.

On 23 July 1974, the bank forwarded a copy of the draft mortgage deed to the company for approval. By this letter, the company would have been aware for the first time that the deed that was being prepared was for a legal mortgage of the said property. The 2nd plaintiff replied to the bank by endorsing on the duplicate of the letter itself that the draft mortgage deed was acceptable. Due to reasons which were not clear the bank did not revert to its solicitors until sometime in October 1974 when the solicitor in charge of this matter in M/s. Osborne Jones & Co, Mr. Francis Pillai, made some inquiries. On 2 November 1974, the solicitors wrote to the 2nd defendant, Abdul Hamid Bin Bilal and this was the first letter written by the bank's solicitors to the owners of the said property. It was in these terms:

We refer to the above matter and are pleased to inform you that the indenture of mortgage is now ready for execution.

Please therefore call at our office together with Mr. Alias Bin Bilal and two directors of Maha Pte. Ltd. to execute the same and also bring along the Common Seal of Maha Pte. Ltd.

Kindly let us have you cheque for $1,090.75 which is made up as follows:

1. Our costs as solicitors for the bank ... $575
2. Our costs as solicitors for the borrowers ... $143.75
3. ...
4. etc.

A reminder was sent by the solicitors on 27 November 1974 to the 2nd defendant asking him to comply with the letter of 2 November 1974.

When Mr. Francis Pillai wrote the letter of 2 November 1974, he did not receive any express intimation that the borrowers and/or owners/mortgagors would wish him to act for them in the matter. It would appear that he assumed that the company would want him to act for them. Thus, he included in the total costs payable the item "costs as solicitors for the borrowers." The following questions and answer in cross-examination are very pertinent:

Q: Would you agree that in the absence of warrant to act you had no authority to act for them?

A: That is correct.

Q: You never acted for the 3rd plaintiff and the 2nd defendant?

A: I did not act for them. I never acted for the 3rd plaintiff and 2nd defendant.

Q: If you had not acted for them, why send a bill to them: see AB37?

A: AB7 shows the property was owned by the 3rd plaintiff and 2nd defendant. I did a search at Registry of Companies and found the 2nd defendant was a director of Maha. Thus I thought it right to write to the 2nd defendant; he is the common factor.

Q: So you acted for both the 2nd defendant and 3rd plaintiff?

A: I acted for the 2nd defendant as a director of Maha. 3rd plaintiff was just a surety.

Q: Who was the borrower?

A: Maha

Q: Company had no security?

A: Yes.

Q: Property jointly belonged to 2nd defendant and 3rd plaintiff?

A: Yes.

Q: They are mortgaging the property to the bank to enable bank to give facilities to Maha?

A: Yes.

Q: Somebody must act for the mortgagors?

A: The 2nd defendant was also a director of the company. It did not draw on me that I had to act for 3rd plaintiff. They are all in the family.

Q: Shouldn't you advise them to seek independant advice?

A: I was acting for 2nd defendant as director of Maha.

Q: If you were not acting for the 2nd defendant and 3rd plaintiff as owners of the property, wouldn't it be proper for you to advise them to seek independant advice?

A: It did not arise in my mind at that time.

From the foregoing I find that Mr. Francis Pillai, notwithstanding that he received the sum of $143.75 as solicitors' costs for the borrowers, did not in fact consider himself as acting for the mortgagors. That perhaps explains why, as we shall see later, he made no effort to explain to the owners/mortgagors the nature and contents of the deed placed before the latter for execution.

On 12 December 1974, the 2nd plaintiff, the 3rd plaintiff and the 2nd defendant attended at the office of M/s. Osborne Jones & Co. As between the evidence of the 2nd plaintiff and the 2nd defendant on the one hand and the evidence of Mr. Francis Pillai on the other, there is only one very important discrepancy. Whereas the former claimed that no solicitor was present when they executed the mortgage deed, the latter said that he was present to witness the execution of the deed by the mortgagors as well as the directors of the company. I accept the evidence of Mr. Francis Pillai that he was present and witnessed the execution. This is also borne out by the two attestation clauses of Mr. Francis Pillai attached to the mortgage deed.

There is however, one material aspect of Mr. Francis Pillai's evidence which I must allude to. His evidence is that other than making sure from his staff as to the identity of the three persons there who were about to sign the deed, he did not explain to any of them as regards the nature or contents of that document. He did not speak to them at all. He assumed that all of them understood what they were about to sign as the bank extended to him a copy of the letter of 23 July 1974 (AB21) whereon the 2nd plaintiff had made an endorsement indicating his approval of the draft mortgage deed.

Mental Condition of 3rd plaintiff

I will now turn to deal with the evidence on the mental condition of the 3rd plaintiff. Dr. Paul Ngui, consultant psychiatrist, gave evidence for the plaintiffs and Dr. Wong Yip Chong, consultant psychiatrist, testified for the 3rd defendant.

Dr. Ngui first saw the 3rd plaintiff on 31 May 1978 and in his report of the same day (PB14-15), he stated the following:

> On psychiatric examination, he was spontaneous and relevant. He was able to give his name, age and address correctly. However, he had some difficulty in giving ... the number of siblings in his family. He was able to write his name in block letters but spells out his address incorrectly. On testing his arithmetic ability, it was extremely poor, he was unable to add simple sums such as 6+7, 7+7...

> During the conversation, his ideas expressed were very superficial and he had difficulty in comprehending more complex questions. On questioning, he had no idea at all whether he owns any property and believes that the property at 344 Onan Road is owned by one of his brothers.
>
> I am of the opinion that he is suffering from mental sub-normality and he is not fit to manage his own affairs.

This report was put up in connection with the application in OS 237 of 1978.

In a further report dated 14 August 1978, Dr. Paul Ngui expressed the following opinion on the question whether the 3rd plaintiff was able to understand the mortgage deed to which he had affixed his thumb-print:

> As stated in my previous report, Mr. Bilal's primary condition is one of mental sub-normality. This condition has been present from his early childhood with delayed developmental milestones. Because of this condition, he is only able to understand simple words and ideas; he is unable to understand more complex aspects.
>
> I have also perused the indenture of mortgage ... it is my opinion that the contract was beyond his understanding. He also had no knowledge at that time that he was a co-owner of the property at 344 Onan Road.
>
> It is my opinion that he had no contractual ability when he put his thumb-print on the contract of 17 December 1974.

In his evidence before me, Dr. Ngui basically re-affirmed what he stated in his reports and he reiterated that he did not think that the 3rd plaintiff would be able to understand the nature of the mortgage deed. Shortly before the commencement of this trial before me, Dr. Ngui examined the 3rd plaintiff again and found that his condition had been the same. He said that a person having a normal conversation with the 3rd plaintiff for 5 to 10 minutes would have great doubts about his mental condition. In cross-examination by Counsel for the 3rd defendant, Dr. Ngui agreed that the 3rd plaintiff looked ostensibly sane but was in fact of unsound mind.

The 3rd plaintiff was examined by Dr. Wong Yip Chong sometime in November 1987. Dr. Wong examined him for an hour and a half though he did not put him through any practical test. Generally, Dr. Wong agreed with the clinical findings of Dr. Ngui that the 3rd plaintiff was subnormal and was a mental defective. Dr. Wong, however, placed a great deal of emphasis on the social development of the 3rd plaintiff, i.e., the adaptation of an individual to life. He highlighted the fact that the plaintiff could carry out spontaneous and relevant conversation. He also managed to keep himself out of trouble. He could do simple chores for the family and listen to the radio and watch television. As regards his contractual capacity, Dr. Wong has this to say in his report dated 30 November 1987:

> With reference to his contractual competency, while I agree that with his mental limitations he could be mentally incompetent in contracting anything of a complex nature, this may not be so for a simple contract.
>
> Therefore, if in the purchase of his property it was presented to him simply as to whether or not he wanted to buy that property he would have the required mental ability to comprehend and decide.

> This is especially so when his social development appears to have reached the level where he can reasonably clearly distinguish what he owns from what he doesn't as well as realise that what he owns may need money to buy.
>
> Likewise, if the mortgage matter were presented to him simply as doing something to the house to borrow money from the bank then he again would be able to comprehend the rudimentary contracting essence underlying the transactions.
>
> In conclusion, at the time of execution of the documents he was likely to have had sufficient mental capacity to understand the basic meaning at the bottom of the contract/s he committed himself to with the party/s concerned when he placed his thumb print on the relevant documents. This is especially so if the fundamentals had been repeated to him over a period of time.

Dr. Wong in his evidence before me seems to say that if the gist of the mortgage deed were explained to the 3rd plaintiff in simple language, the latter would be able to understand. He agreed that the mortgage deed is a complex document. In cross-examination, Dr. Wong also said the 3rd plaintiff cannot handle money. Dr. Wong himself did not attempt to explain the mortgage deed to the 3rd plaintiff to determine whether or not the latter understood it as the mortgage deed was not furnished by the bank to Dr. Wong. In re-examination, Dr. Wong said that the 3rd plaintiff would be able to understand better if the explanation was done by someone he trusted.

The 3rd plaintiff has testified before me and having heard the way he gave evidence, (very often answers were forthcoming only after much effort on the part of the interpreted and in some instances the answers do not make sense), I have no hesitation in accepting the opinion of Dr. Ngui that the 3rd plaintiff had no capacity to understand the mortgage deed which he executed. The test to be applied is whether there was understanding on the part of the 3rd plaintiff of the transaction: see *Birkin v. Wing* [1890] 63 LT 80. In my opinion the very concept of a mortgage as a security for banking facilities to be granted by the bank to the company in which his other two brothers had an interest is not a simple matter on which the 3rd plaintiff was able to understand. It is very telling that the 3rd plaintiff did not even know that he is a co-owner of the said property. He even thought that the said property belongs to the 2nd plaintiff as the 2nd plaintiff lives there. I do not think that that can be explained away merely by saying that he has a bad memory. The simple truth is that he did not understand and still does not understand what it means to own a property. All he seems to know is that he is living at 339 Onan Road. Certain simple things around the house he could help, but beyond that I have grave reservations. He was not able even to recount the number of siblings he has or to give their names. When asked if he were given 7 cigarettes and 4 were taken away from him, how many would be left, he replied 6. Accordingly, I find that the 3rd plaintiff had no capacity to enter into the mortgage deed on the day in question. He did not know what he was executing. The fact that a person manages to keep himself out of trouble and is homely does not necessarily mean that he cannot be of unsound mind.

The general rule is that a deed executed by a person who has no mental capacity to do so is voidable. But the question I have to consider is whether it is voidable against the bank, whom Counsel said was an innocent party.

As regards the general effect of mental incapacity on the contractual competence of a person, *Halsbury Laws of England* at Vol. 30 (4th Edn), in paras. 1005-1006 states the following:

> There must be a free and full consent to bind persons in contract. Consent is an act of reason and of volition or choice, and it is on the ground that there is a want of rational and deliberate consent that the contracts of mentally disordered persons may be invalidated. A valid contract cannot be made by a person suffering from such incapacity of mind as not to understand the nature of what he is doing ...
>
> A fair contract with a person who was apparently of sound mind, but who in fact was suffering at the time of the contract from such mental disorder as rendered him incapable of entering into the contract, is voidable but not void. If the contract is not to be enforced against him, the person mentally disordered must prove that the other party either knew that he was of unsound mind or knew of such facts as would justify the Court in inferring such knowledge.

The word "fair" in the above quotation may have to be deleted in view of the decision of the Privy Council in *Hart v. O'Connor* mentioned below.

In *Campbell v. Hooper* [1855] 3 Sm & G (at p. 153) where a mortgagee sought a decree directing repayment and foreclosure in default of such repayment and where there was evidence that at the time the mortgage was executed the mortgagor was a lunatic, V.C. Stuart said at p. 1578:

> I do not understand that the simple fact of lunacy, if established, would deprive the mortgagee of all rights to equitable relief. I am not aware of any case in which it has been so held ...
>
> Even at law the contract of a lunatic is not necessarily void. Even at law the plaintiff in an action at law, seeking to recover under the contract of a person whose lunacy is established, has been held to be entitled to relief ...
>
> Mr. Justice Patterson, in the case of *Dane v. Lady Kirkwall* (8C & P 685) in directing the jury laid down the law thus: 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it.' It would be a strange thing if a Court of Equity in dealing with contracts were to deal on any different principle.

In *Imperial Loan Co. v. Stone* [1892] 1 QB 599, Lord Esher said that a lunatic (now such a person is known as mentally disordered) can only set aside a contract entered into with a person of sound mind in the following circumstances (at p. 601): "When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what it was about."

The most recent authority on point in *Hart v. O' Connor* [1985] 1 AC 1000, a decision of the Privy Council (on an appeal from New Zealand) which reaffirmed the principle laid down in *Imperial Loan Co.* The Privy Council reversed the decision of the New Zealand Court of Appeal which held that where a contract is substantively unfair, a lack of capacity can be set up even against a party who was not aware of it. The development of the law on this subject was succinctly stated by Lord Brightman as follows (p. 1018):

> The original rule at law, and still the rule in Scotland, was that a contract with a person of unsound mind was void, because there could be no *consensus ad idem*. This was later qualified by a rule that a person could not plead his own unsoundness of mind in order to avoid a contract he had made. This in turn gave way to a further rule that such a plea was permissible if it could be shown that the other contracting party knew of the insanity.

Reverting to the facts of the present case, the question that arises for consideration is whether the bank knew or ought to have known that the 3rd plaintiff was mentally disordered and had no contractual capacity. An allegation was made by the 2nd plaintiff in his answer to cross-examination by Counsel for the 3rd defendant that two officers of the bank had visited the 2nd plaintiff in his home and they had met the 3rd plaintiff and must have known that the 3rd plaintiff was mentally unsound. I find this part of the 2nd plaintiff's evidence unsatisfactory and do not accept it. This allegation of actual knowledge on the part of the bank officers was not raised in any of the plaintiffs' solicitors' correspondence with the 3rd defendant's solicitors or in the pleadings until this trial has well commenced and the whereabouts of the two officers could not be ascertained as they have since left the bank. I do not think there is any actual knowledge on the part of any officers of the bank regarding the 3rd plaintiff's mental incapacity; if that were the case, the bank would have committed a fraud on the 3rd plaintiff.

There was also a faint suggestion that anyone who looks at the 3rd plaintiff would have realised that he is of unsound mind. Counsel for the plaintiffs did not really persist with that suggestion. In any case, I am unable to accept it. I do not think it is possible to ascribe to any "look" as necessarily suggesting unsoundness of mind on the part of that person. I have seen the 3rd plaintiff. There is nothing in his look as such which would suggest that he is of unsound mind. However, I would be inclined to agree with Dr. Ngui that if one were to talk or put questions to the 3rd plaintiff one would soon, from his replies, realize that the 3rd plaintiff was not mentally in order.

The point to consider is whether knowledge may be imputed to the bank in view of the circumstances. Here the way in which the bank went about to obtain the mortgage of the said property as security shows that it had made the 2nd plaintiff its agent to secure that. It was through the 2nd plaintiff that the title deeds of the said property were forwarded to the bank. The bank, at no time, dealt directly with either of the two owners of the said property. The bank officials did not see or talk to the owners. The bank communicated with the 2nd plaintiff to obtain particulars relating to the owners of the said property. They were furnished by the 2nd plaintiff. It is significant that even in its letter of 23 July 1974 when forwarding a copy of the draft mortgage deed for approval, the bank did not send it to the owners (which should have been the case) but addressed it to Maha Pte. Ltd. for the attention of Ismail Bin Bilal (2nd plaintiff) who duly approved the draft mortgage deed. The bank obviously wanted the 2nd plaintiff to forward the same to the owners of the said property and perhaps to explain it to them as well. The first time the owners were contacted with regard to the proposed mortgage was by the letter of 2 November 1974 written by the solicitors for the bank addressed to Abdul Hamid Bin Bilal (2nd defendant) requesting him to call at the solicitors' office together with Alias Bin Bilal (3rd plaintiff) and the directors of the company to execute the mortgage deed. No further explanation was given in that letter. They were not advised to obtain independant legal advice. As mentioned above, when eventually the 3rd plaintiff, together with the others, attended at the office of the solicitors to execute the deed, the solicitor in question, Mr. Francis Pillai, did not talk to the signatories at all. He did not explain to any of the persons the nature or the terms of the deed they were about to execute. He just assumed that the parties knew what they were about to execute. He assumed that the 2nd plaintiff had explained to the 3rd plaintiff. In so far as the 2nd plaintiff was concerned, he clearly knew that the 3rd plaintiff was a person *non compos mentis*. I accept the 3rd defendant's Counsel's submission that the 2nd plaintiff did not inform

the bank about the 3rd plaintiff's incapacity. Of course, he should have done so. The 2nd plaintiff said that he never explained the draft mortgage deed to the 3rd plaintiff and I accept his evidence on that. Knowing the 3rd plaintiff's mental condition, there would have been no point in the 2nd plaintiff trying to explain it to the 3rd plaintiff. By dealing with the owners of the said property through the 2nd plaintiff rather than directly, the bank has made the 2nd plaintiff its agent and the bank must be imputed to have the knowledge which the 2nd plaintiff had of the mental incapacity of the 3rd plaintiff.

Even assuming that I am wrong to impute knowledge to the bank as aforesaid, constructive knowledge on the part of the bank could still be inferred if one examines them circumstances surrounding the execution of the mortgage deed by the 3rd plaintiff, including the way in which the bank dealt with the owners/mortgagors of the said property. It could be different if the solicitor who witnessed the execution by the 3rd plaintiff had clearly explained to the 3rd plaintiff the full purport of the deed he was about to execute. But that was not the case. As I have said above, the solicitor did not ensure that the 3rd plaintiff understood what he was executing. The solicitor assumed that the 3rd plaintiff understood the document since his brother, the 2nd plaintiff, accepted the draft mortgage deed. This is where the error lies. The 2nd plaintiff could only accept the draft in his capacity as the borrower and not as the owners of the said property. The 2nd plaintiff's interest was clearly different from that of the 3rd plaintiff's. This omission on the part of the solicitor is critical when one considers that the 3rd plaintiff did not sign the deed. He placed his thumb-print onto it. It must be obvious to the solicitor that he was dealing with an illiterate person. That was the first time the solicitor had seen the 3rd plaintiff. He should have at least explained to the 3rd plaintiff the nature and effect of the deed and made sure that he understood it before asking him to place his thumb-print onto it. If only the bank, through its officers, had seen the 3rd plaintiff and spoken to him and/or if its solicitor had explained and spoken to the 3rd plaintiff before the latter was asked to execute the deed, they would have been put on notice as regards the mental incapacity of the 3rd plaintiff. It is of significance that even the bank's own internal "Sanction Advice" (Exh. "TD4") from its headquarters in Pakistan approving the banking facilities to the company recognised the need to deal with an illiterate person with caution as it prescribed the following requirement: "In case of advances against guarantee or securities provided by a third party who is not conversant with the English language, their signatures should be attested by an independent person (preferably their legal adviser) conversant with the English language endorsing that the contents have been read over and explained to the executors." The bank officers failed to take steps to ensure that this directive was complied with. It must be remembered that in *Hart v. O'Connor*, the vendor who was of unsound mind was represented by his own solicitor.

It seems to me quite wrong for a solicitor to make a person, who is illiterate and unrepresented, execute a deed which would clearly be to his disadvantage without so much as to ensure that the person understands what he is about to execute. When asked how knew he that the mortgagors in this case executed voluntarily, as he had so stated in the attestation clause, Mr. Francis Pillai answered that he saw them looking at the document and that if there were any doubts they would have asked questions. This really begs the question in so far as the 3rd plaintiff is concerned as he is illiterate. This omission by its solicitor, which in my view is fundamentals, must affect the bank. I do not for a moment suggest that this omission was deliberate. It was probably a momentary lapse or a misjudgment. But the consequences must follow. The bank must be deemed to have constructive knowledge of the 3rd plaintiff's mental

incapacity. I do not see how a Court of equity can permit a party, who has obtained the execution of the deed in such circumstances, to enforce it against the other party. If there is an innocent party here in the true sense, it is the 3rd plaintiff.

For the foregoing reasons I would hold that the deed should be set aside.

Undue Influence

On the same facts as discussed above, there is another basis on which the mortgage deed could be set aside. This is on the ground of undue influence, not on the part of the bank but on the part of the 2nd plaintiff as agent of the bank.

Treital on Law of Contract (7th Edn.,) states the following at p. 314-5:

> Equity gives relief on the ground of undue influence where an agreement has been obtained by certain kinds of improper pressure which were thought not to amount to duress at common law because no element of violence to the person was involved. The burden of proving that such undue influence has been exercised normally lies on the party impeaching the transaction.
>
> The rule as to burden of proof just stated does not apply in a number of situations in which a presumption of undue influence arises from certain relationships between the parties. There was formerly some support for the view that, where such a relationship existed, the transaction could be set aside on grounds of public policy, even though it was not disadvantageous to the party claiming relief. But the House of Lords has now rejected this view and has held that the basis of relief was "not a vague 'public policy' but specifically the victimisation of one party by the other." It follows that the presumption of undue influence is not, of itself, a ground for relief. It absolves the claimant from having to show that the alleged influence actually existed, but it does not absolve him from the need to establish the unfairness of the transaction that he seeks to set aside.

The House of Lords' case referred to in this quotation is *National Westminster Bank v. Morgan* [1985] AC 686.

Turnbull & Co. v. Duval [1902] AC 429 and *Chaplin & Co. v. Brammall* [1908] 1 KB 233 are two cases involving the relationship of husband and wife. In *Turnbull* the creditor used the husband in order to exert pressure on the wife to produce a security for the benefit of the creditor. In *Chaplin* the creditor left it to the husband to obtain the execution of a guarantee by the wife. In those two cases equity intervened to grant relief to the two wives on the ground of undue influence exerted by their husbands.

There are a number of recent cases of the English Court of Appeal which are highly instructive as to the way in which the equitable principle of undue influence should be applied. Before doing so the following caution uttered by Lord Scarman in *National Westminister Bank v. Morgan* at p. 709 merits repeating:

> There is no precisely defined law setting limits to the equitable jurisdiction of a Court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The Courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the Court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A Court in the exercise of this equitable jurisdiction is a Court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

First is the case *Avon Finance Co. Ltd. v. Bridger* [1985] 2 All ER 281. There an elderly couple proposed to purchase a retirement house. The arrangements were made by their son. The son agreed to provide his parents with a sum of £2,500 as a loan to purchase the property. Besides the savings which the parents had, they also needed a further loan of £5,000 from a building society, which required a first mortgage of the property. The son, however, took the opportunity and raised a loan of £3,500 with Avon Finance Co Ltd by way of a second charge over the property. He deceived the parents into signing the document effecting the second charge by saying that the document was related to the £5,000 loan from the building society. The document was prepared by the finance company's solicitors and executed at the solicitors' office. The Court of Appeal unanimously held that the charge should be set aside. The reasons of the majority were delivered by Brandon LJ, who after stating that the case fell within the principle of *Chaplin* said at p. 287 that the following three matters gave rise to an equity in favour of the parents:

> The first matter is that the plaintiffs chose to appoint the son, who was the debtor, to procure from his parents the security which he and they needed to further the transaction on which they were engaged. It was for the plaintiffs' benefit to have this security because they are in business for money lending, and they wanted a good secure moneylending contract. They chose to appoint the son, a young accountant in the prime of life, to procure this contract from his parents, both of whom were old-age pensioners, much less well educated than he was. The person whom they chose to appoint, being a son, could be expected to have some influence over his elderly parents, and that is something of which the plaintiffs could or should have been aware. In fact, the son was fraudulent. He deceived his parents, and by his deception induced them to enter into this transaction. We have those two matters, the procurement of the security by the son and the relationship between the son and his elderly parents of different educational attainment. Finally we have the third factor of the absence of any independent advice.

The next case is *Kingsnorth Trust Ltd. v. Bell* [1986] 1 All ER 423 where a wife executed a second charge on the matrimonial home in which she was beneficially interested as security for the repayment of a sum of money lent to her husband's company. The husband obtained her signature by concealing from her the true purpose of the loan. The lenders' solicitors, having prepared the documentation, forwarded the same to the husband's solicitors with a request that the latter should arrange to have the documents duly executed and returned to them. They also asked the husband's solicitors to act as their agents on completion. The husband then took the documents from his solicitors for signature by his wife. The lenders had no knowledge of how the wife's signature was obtained or of who was going to obtain it. The Judge found as a fact that the wife trusted the husband and had been induced to execute the charge by a fraudulent misrepresentation of his part. The Judge also found that, if she had been properly advised she would not have executed the charge. The County Court Judge nevertheless gave judgment in favour of the lenders. On appeal, the Court of Appeal set aside the order for possession of the Judge below, following the principle established in *Turnbull* and *Chaplin*. It held that the lenders were bound by the husband's acts either because the husband's solicitors, as their sub-agent, had left it to the husband to obtain his wife's signature or because, through their own solicitors, they had chosen to leave it to the husband's solicitors, and thus to the husband, to obtain the wife's signature. Dillon LJ who delivered the judgment of the Court said (at p. 427):

> On the general law of principal and agent, the principal (the creditor), however personally innocent, who instructs an agent (the husband) to achieve a particular end (the signing of the document by the wife) is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier by the agent and not corrected.

Coldunell Ltd. v. Gallon [1986] 1 All ER 429 was a case of an elderly couple who offered to help their son in his business. The son arranged with moneylenders for a loan of £20,000 to the father and the son was to be the surety and the loan was to be secured by a charge on the house where the parents lived. The lenders' solicitors dealt mainly through the son. The solicitors sent to the parents by post a legal charge to be signed by the father and a consent to the loan to be signed by the mother and sent a letter to each parent advising them to take independent advice before signing the documents. For reasons unknown the letters never reached the parents. The parents' signatures to those documents were procured by the son in the presence of his own solicitor, who merely explained the consent form to the mother and witnessed the signatures without advising the parents as to the nature and effect of the transaction. In this case, the Court of Appeal, not without some hesitation, refused to grant relief to the parents because it held that there was no evidence that the son was in any way an agent of the lenders and the misdeeds of the son could not be imputed to the lenders. Oliver LJ said at p. 439:

> Here, by contrast, the father was himself to be the principal debtor and the transaction, so far as the plaintiffs were concerned, was to be completed by their solicitors. Those solicitors, in their turn, caused or thought that they had caused the documents to be dispatched direct to the father and the mother with a covering letter specifically directing attention to the desirability of obtaining independent legal advice. They cannot, it is submitted, and certainly the plaintiffs themselves cannot be held responsible if, after the documents are returned to them executed in the presence of a solicitor, it subsequently transpires that the addressee has chosen to ignore the counsel that he was given.

and at p. 440, he said:

> The proposition, in the circumstances of this case therefore, that Mr. Dunsdon, or Mr. Dunsdon and Mr. Twycross between them, had appointed the son as the plaintiffs' agent to obtain his parents' signature or that they had 'left it all to the son' is not, in my judgment, supported by the evidence, and to grant equitable relief to the defendants in respect of the son's acts alone without their authority or knowledge is to go further than any decided case has yet gone. It may well be that, as Dillon LJ said in *Kingsnorth Trust Ltd. v. Bell* [1986] 1 All SR 423 at 428, [1986] 1 WLR 119 at 125, the only absolutely sure way of ensuring that a guarantee or charge from a third party is valid is to insist on that party being independently advised. **But the fact is that no lender can ever be absolutely sure that a guarantor is not being subjected to pressure from the principal debtor, and to require him to do more than properly and fairly point out to the guarantor the desirability of obtaining independent advice, and to require the documents to be executed in the presence of a solicitor, is to put on commercial lenders a burden which would severely handicap the carrying out of what is, after all, an extremely common transaction** of every day occurrence for banks and other commercial lenders. (Emphasis added).

Finally I would refer to the case *Bank of Baroda v. Shah & Anor.* [1988] 3 All ER 24. I will first recite the facts and decision from the headnote of the report:

By a legal charge in favour of the plaintiff bank the defendants charged their property with the payment to the bank of all moneys at any time owed to the bank by S Ltd. The defendants entered into the legal charge as the result of misrepresentation and undue influence exerted by the second defendant's brother, S, who was one of the two directors of S Ltd., whose solicitors acted for the defendants in connection with the charge although the defendants had not in fact instructed them to do so. Subsequently, S Ltd. defaulted under its obligations to the bank and the bank brought an action for possession of the defendants' property. The Judge dismissed the action, holding that the defendants had executed the charge under the undue influence of S and S Ltd.'s solicitors, that the defendants would not have executed the charge but for such influence, and that the bank was infected with the conduct of S and the solicitors. The bank appealed.

Held - There was no obligation in law on the bank to ensure that the defendants received entirely independent legal advice before they executed the legal charge on the property. The bank was entitled to assume that S Ltd.'s solicitors would act honestly and would give proper advice to the defendants if the solicitors were, as they represented, acting for the defendants, and when the legal charge executed by the defendants was returned to it by the solicitors the bank was entitled to treat the return of it as confirmation that the solicitors had indeed been acting as solicitors for the defendants. The fact that, unknown to the bank, S Ltd.'s solicitors had no authority from the defendants to act did not lead to the conclusion that the bank was to be treated as having entrusted the task of getting the legal charge executed by the defendants to the solicitors in the capacity which they actually held, namely as agents for S and solicitors for S Ltd. In the circumstances, the bank was not infected with the conduct of S in exerting undue influence on the defendants or of S Ltd.'s solicitors in misrepresenting to the bank that they had authority to act for the defendants.

Now it should be observed that *Bank of Baroda* involved a brother and a sister. It is clear that the Court of appeal decided the way it did because it held that neither the bank nor its solicitors left it to S or S Ltd. to obtain the execution of the deed by the defendants. Its solicitors dealt directly with another firm of solicitors who held themselves out as acting for the defendants. Dillon LJ said in conclusion at p. 29:

Against that background it is plain, in my judgment, that Singh & Ruparell never intended for a moment to leave it to Jayantilal Shah or Seasonworth to get the legal charge executed by the defendants. They left that to Shah & Burke in the capacity of solicitors for the defendants which Shah & Burke had represented themselves as holding and which Singh & Ruparell believed them to hold. The fact that, unknown to Singh & Ruparell, Shah & Burke had no authority from the defendants does not lead to the conclusion that Singh & Ruparell are to be treated as having entrusted the task of getting the legal charge executed by the defendants to Shah & Burke in the capacity which they actually did hold, namely as agents for Jayantilal Shah and solicitors for Seasonworth. Accordingly in my judgment the defendants fail to bring this case within the *Turnbull v. Duval* and *Chaplin v. Brammall* line of authorities.

On the above authorities, it is clear that whether in a particular case the lender has made the debtor its agent to obtain a security from a surety and whether the debtor has exercised undue influence over the surety of a kind which would entitle the surety to set aside the security would very much depend on its facts. In the present case, while the relationship of the 2nd plaintiff and the 3rd plaintiff as brothers does not *per se* give rise to a presumption of undue influence, but on the evidence there can be no doubt that the 2nd plaintiff did in fact exercise undue influence over the 3rd plaintiff in securing the execution by the 3rd plaintiff of the mortgage deed. Not that it matters, I think the bank must have realized that some influence would have been brought to bear by the 2nd plaintiff over the 3rd plaintiff as the

business of the company had nothing to do with the 3rd plaintiff and why should the 3rd plaintiff put his property to risk. As the 3rd plaintiff said in Court, he would do what his brother, the 2nd plaintiff, asked him to do. I am convinced that that was so and that was what happened. The 2nd plaintiff did not explain to the 3rd plaintiff what the document was about. The 2nd plaintiff knew that the 3rd plaintiff would carry out his biddings, whatever they were. As I have held above, the bank made the 2nd plaintiff its agent in obtaining the mortgage of the said property from the 3rd plaintiff. It will be recalled that the bank did not send the draft mortgage deed for approval to the owners but to the 2nd plaintiff. This necessarily suggest that the bank had intended to make the 2nd plaintiff its agent to forward the draft to the owners and perhaps to explain the draft to them. I know I am repeating myself but it has to be said again: none of the bank officers bothered to talk to or confirm with the owners that they had on their own free will parted possession of the title deeds of the said property to the 2nd plaintiff for him to forward the same to the bank and that they had understood what they were going to do. It is true that the bank's solicitors wrote to one of the mortgagors (the 2nd defendant) asking him and the 3rd plaintiff, as well as the directors of the company, to come to the solicitors' office to execute the mortgage deed and the deed was so executed at the solicitors' office. I would mention in passing that in *Avon Finance Co. Ltd.* (though the facts there are not identical to ours) the instrument was executed in the lenders' solicitors' office and that did not seem to make a difference. This intervention by the bank's solicitors was really of no consequence as the solicitor in charge did nothing to remove whatever influence the 2nd plaintiff had exercised over the 3rd plaintiff. He assumed that the 2nd plaintiff had explained to the 3rd plaintiff. He relied on the fact that the 2nd plaintiff had accepted the draft mortgage deed. In other words, whatever undue influence exercised by the 2nd plaintiff over the 3rd plaintiff was allowed to remain. For all practical purposes, it is in my view the same as if the solicitor had allowed the 2nd plaintiff to take the document home for the 3rd plaintiff to execute. The mortgage deed was after all a common law deed which did not require any attestation. I find that the influence which the 2nd plaintiff had over the 3rd plaintiff must have persisted throughout the execution. All I can say is that the solicitor was physically there but nothing more. Such presence *per se* cannot be of any significance. The 3rd plaintiff had nothing to gain and everything to lose out of the transaction. It was a transaction which was entirely to his disadvantage. He was unrepresented, yet neither the bank nor its solicitors saw fit to advise the 3rd plaintiff to take independent advice in view of the adverse consequences that could arise from the mortgage deed. The bank must be held to be affected by the undue influence exercised by the 2nd plaintiff over the 3rd plaintiff. Accordingly the mortgage deed should also be set aside on this ground.

The argument has been advanced by Counsel for the bank that as the mortgage deed is only voidable it should not be set aside as there could not be *restitutio in integrum*: see *Neill v. Morley* 32 ER 687 and *Molton v. Camroux* 154 ER 1107. But I will just quote the following statement from *Treital on Law of Contract* (7th Edn.,) at p. 321:

> As in cases of misrepresentation, the party seeking rescission must restore benefits that he has obtained under the contract, but he is not required to make precise restitution: the principle of allowing rescission for misrepresentation so long as equity can achieve a result that is "practically just" applies also where rescission is sought on the ground of undue influence.

The 3rd plaintiff received nothing under the mortgage deed from the bank. There is nothing for him to make restitution.

Before I conclude this judgment there are three matters which were raised in evidence and in submission and which I think I should refer to briefly. The first relates to the purchase of the said property in 1961. The said property was purchased by the 2nd defendant and 3rd plaintiff on 11 October 1961 with their shares of the proceeds from the estate of their deceased father. The 3rd plaintiff then executed the indenture of conveyance also by his thumb-print. Mr. Francis Pillai said he had come across clients who had executed deeds by way of thumb-print but who were none the worse in terms of mental capacity. I accept that illiteracy does not necessarily mean unsoundness of mind. Be that as it may, the question of the validity of the indenture of conveyance of 11 October 1961 is not before me. But it should be apparent that a simple purchase of property is, of course, a different kind of transaction from a mortgage of property to a bank to secure banking facilities granted by the bank to another customer. Even there, Mr. C.C. Tan, who acted for the parties in the conveyance, in answer to the question whether he explained to the 3rd plaintiff the transaction said:

> I only asked a few formal questions; did you buy this property with your brother. I must have spoken to him in Malay.

When asked whether he would take the trouble to explain the details of a mortgage, like the present, to a mortgagor, he answered he would. Mr. Tan also said that he would send the draft mortgage to the mortgagors and not the borrowers. I do not think there is anything relating to the earlier transaction in 1961 which could mitigate the effects of the omissions of the bank and/or its solicitors.

The second matter relates to the change of the mortgage from one of equitable mortgage to one of a legal mortgage. Connected to this is the point that the solicitors also altered the terms thereof, i.e., a security for $60,000 to one of an unlimited amount and a security for a five-year term to one without any specified period. I must state here that in forwarding the title deeds to the bank on 16 January 1974, no mention was made by the 2nd plaintiff about the amount to be secured or the period thereof. These two terms were only raised in the correspondence between the bank and its solicitors which were never copied to the company or the owners. The 2nd plaintiff in his evidence before me did not say that he did discuss with the bank officers on these two terms. In view of my finding that nobody ever explained to the 3rd plaintiff what the transaction was all about, much less the details thereof, I do not think these points are of any consequence. For this same reason, I do not think the plea of *non est factum* is applicable.

The third matter relates to the allegation that the bank put undue pressure on the 2nd plaintiff to obtain the mortgage. Having considered the evidence, including the correspondence and other documentary evidence surrounding the transaction, I do not see anything wrong in the bank asking for the mortgage as an additional security for the banking facilities. The fact that the bank had probably relied more on the standing and commitment of Peter Wahid Andu in granting the facilities to the company did not necessarily mean that they could not also legitimately ask for more tangible security from the directors of the company. The allegations of pressure on the part of the bank officers are rather vague. The 2nd plaintiff said this arose because the nationalization of the bank in 1974. But the bank had already indicated its requirement of an equitable mortgage as early as January 1974 and there is no evidence that by then the bank had already allowed the company to draw on the facilities. I find the 2nd plaintiff to be a worldly-wise businessman. He must have thought that this link-up with Peter Wahid Andu was going to be profitable. It might well be that he under-

rated the risks. But the Court cannot help him there. For the record, I may mention that Peter Wahid Andu died in an air crash in June 1976 and a judgment in default had been obtained by the bank against his estate in the High Court in Borneo pursuant to the guarantee given by him on 7 March 1974. Only part of the judgment had been satisfied from his estate. Having said the foregoing, I must hasten to clarify that this matter in no way affects the points discussed above relating to the mental incapacity of the 3rd plaintiff and the exercise of undue influence by the 2nd plaintiff over the 3rd plaintiff.

In the result I would grant a declaration that the mortgage deed executed by the 3rd plaintiff is voidable at the option of his committee and would set it aside (in so far as it affects the 3rd plaintiff) and grant such other consequential reliefs as may be necessary. The 3rd defendant shall bear the costs of the plaintiffs.

Also found at [1989] 2 CLJ 893